

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

ORIGINAL
74-1493

P/S

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

IN THE MATTER

of

R. HOE & CO., INC.,

Debtor.

In Proceedings for the Reorganization of a Corporation

ABARTA CORP. (d/b/a PRESS PUBLISHING CO.),

Claimant-Appellant,

against

JAMES B. KILSHEIMER, III and
ROBERT M. CORRAO, as Trustees,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLANT



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BRIEF ON BEHALF OF APPELLANT

Issues Presented for Review

1. Where the Trustee of a Chapter X debtor failed and refused to complete at the original contract price a pre-petition executory contract for the manufacture and sale to Claimant of a printing press, was such failure and refusal a breach of contract entitling Claimant to damages and to file a proof of claim therefor?
2. Where the Claimant had paid \$596,041 out of a total contract price of \$836,679 prior to the filing of the Chapter X petition and the Trustee and the District Court advised Claimant that the printing press would not be completed or delivered unless and until Claimant prepaid the balance due under the contract and paid a premium over and above the contract price and Claimant agreed to do so after the Court expressly indicated that by so agreeing Claimant and other customers of the debtor similarly situated would have the right to file proofs of claim for the premium and would not waive such right by agreeing to pay the premium:
 - (a) Did Claimant thereby waive its right to damages for breach of the original contract?
 - (b) Was the agreement between Claimant and the Trustee, whereby Claimant agreed to pay a premium over and above the original contract price to have the press completed and delivered, a novation or substituted contract which precluded Claimant from claiming damages for breach of the original contract?

(c) Assuming, *arguendo*, that the agreement between Claimant and the Trustee whereby Claimant agreed to pay a premium over and above the original contract price to have the press completed and delivered could be construed as a novation or substituted contract, was such "novation" or "substituted contract" the result of economic duress, where it is undisputed that the press ordered by Claimant and eventually manufactured by the debtor was custom made for Claimant's needs and specifications, the press was much needed in Claimant's business, Claimant would not have been able to obtain a press with the same features from any other manufacturer and the average delivery time for a press of the size and type ordered was approximately one year from the date the contract for any such press was signed?

3. Where subsequent to the filing of the reorganization petition, the prepayment by Claimant of the balance of the original contract price and the payment by Claimant of a premium over and above the original contract price was necessary to enable the debtor to continue its operations and avoid being adjudicated a bankrupt and was the result of economic duress, should Claimant's claim for the amount of the premium have been allowed as a priority administration claim?

Statement of the Case

Preliminary Statement

This is an appeal from an order (A 159-60)* of the United States District Court, Southern District of New York (Tyler, J.)** entered on February 15, 1974, disallowing and expunging the claim of Claimant Abarta Corp. (d/b/a Press Publishing Co.) (hereinafter referred to as "Claimant") in these proceedings and refusing to adopt the recommendation of the United States Magistrate (Raby, J.) sitting as a Special Master, that such claim be allowed in full as a general unsecured claim.

Claimant's claim is for \$177,028, representing the difference between the original contract price for a printing press ordered by Claimant from the debtor prior to the reorganization proceeding and the increased price which Claimant was required to pay to the Debtor's trustee in reorganization to obtain delivery of such printing press.

As indicated in the Special Master's Report (A 67):

The importance of this claim lies, not only in the intrinsically substantial amount of the claim itself, but also in the fact that this claim constitutes a "test case", upon the ultimate determination of which will depend the propriety of a number of substantial claims of similar nature.

Claimant's proof of claim was filed on January 7, 1970 (A151). The proof of claim alleged in relevant part

* References bearing the prefix letter "A" are to the Joint Appendix.

** Although Judge Tyler signed the order appealed from, the order was entered upon the decision of the Hon. Sylvester J. Ryan, who was unavailable to sign the order. On or about February 13, 1974, these reorganization proceedings were reassigned from Judge Ryan to Judge Tyler (A 9).

that

The payment of said premium [\$177,028] over and above the original contract price constitutes damages to the claimant arising from what was in substance the rejection by the Trustee of an executory contract between the Debtor and the claimant. (A 41)

On December 9, 1971, the Trustee filed an objection to Claimant's claim, asserting that the premium of \$177,028 was the result of a "novation of the original contract" arising from Claimant's agreement to "renegotiate its contract with the Debtor" (A 60-61). By order dated December 10, 1971, Judge Ryan appointed Hon. Harold J Raby, United States Magistrate, as a Special Master to hear and report on the Trustee's objections (A 53-54). A hearing was held thereon on December 30, 1971. Thereafter, on March 13, 1971, the Special Master rendered his report, recommending that Claimant's claim be allowed in full as an unsecured general claim (A 66-70). In rejecting the Trustee's "novation" and "substituted contract" objection, the Special Master specifically found:

The record makes it clear, on the contrary, that the trustee entered into the arrangements which he did with this claimant and others similarly situated with the full knowledge that this claimant did not regard the transaction either as a novation or as a substituted contract (A 69).

The Trustee thereafter moved before Judge Ryan to reject that part of the Special Master's report* which recommended that Claimant's claim be allowed (A 84-86). At Judge Ryan's direction, the parties prepared a "Record Re Trustee's Objection to Proof of Claim Filed By

* The Special Master's report also dealt with objections which the Trustee had made to claims of other creditors.

Abarta Corp. (d/b/a Press Publishing Co.) (A 87-153), which record included, among other things, excerpts from the transcripts of hearings before Judge Ryan in connection with the reorganization of the debtor and the motion made by the Trustee with respect to completion of presses which were uncompleted on the date of filing the reorganization petition (A 89-142) and a "Stipulation of Historical Facts" dated May 2, 1973* containing facts which counsel for the respective parties agreed could be considered by the District Court in connection with the Trustee's objections to Claimant's claim (A 145-52).

By memorandum decision dated January 10, 1974, Judge Ryan decided that Claimant's claim should be disallowed and expunged (A 154-58), holding that by agreeing with the Trustee to pay the additional premium over the original contract price in order to obtain delivery of the press it had contracted to buy from the debtor, Claimant thereby elected to waive its right to assert a claim for the premium. An order providing for the disallowance of Claimant's claim, dated February 1, 1974, was entered on February 15, 1974 (A 159-60). This appeal followed (A 161).

Statement of Facts

Claimant is the publisher of the Atlantic City Press, a daily and Sunday newspaper (A 145). At the time when the debtor dealt with Claimant it was a manufacturer of rotary printing presses and other machinery (A 154). On November 1, 1968, prior to the filing of the reorganization petition by the debtor, Claimant entered into a written contract with the debtor for the manufacture of and sale by the debtor to Claimant of a six unit Colormatic printing press and equipment incidental thereto, for an aggregate

* The District Court's opinion erroneously states that such stipulation was entered into while the parties were before Magistrate Raby (A 154-55).

gate purchase price of \$836,679, net, f.o.b. the debtor's plants* (A 145). The Colormatic press ordered by Claimant was to be custom made for Claimant's needs and specifications and contained features that Claimant would not have been able to obtain from any other press manufacturer (A 146).

On July 7, 1969 the debtor filed a petition for reorganization under Chapter X of the Bankruptcy Act, which petition was approved by Judge Ryan on July 9, 1969 (A 147). At the outset of the proceedings the debtor was confronted with a cash crisis and an immediate need for several million dollars to enable it to continue in operation (A 23, 147). To meet such cash crisis the Trustee proposed that with respect to the orders which the debtor already had on hand, the debtor use its principal efforts to complete the manufacture and delivery of printing presses of those customers who agreed to prepay the balances to become due under their respective contracts and in addition, agreed to pay additional amounts over and above the contract price (A 24-25, 91-92, 148).

An order to show cause dated July 14, 1969, directed the debtor's approximately 74 press customers, including Claimant, to show cause why the debtor should not be directed to devote its principal efforts to the manufacture and delivery of the presses of those customers who pre-paid the balances to become due under their respective contracts, and, in addition, agreed to pay additional amounts over and above the contract price, which in the case of those customers whose presses were scheduled for delivery before September 8, 1969, amounted to 10% of the original contract price and which in the case of those customers whose presses were scheduled for delivery subsequent to September 8, 1969, would be an amount to be negotiated by those customers with the Trustee (A 12-21).

* Subsequently, on June 20, 1969 an addition was made to the contract to cover ten rollers at a cost of \$175 (A 146).

Claimant was in the latter group of customers. A hearing upon the Trustee's application was held before Judge Ryan on July 17, 1969 at which representatives of the various press customers were present. At the hearing, the Trustee's counsel stated:

What is sought by this hearing in essence is to generate enough cash to continue the operations of the company in the immediate future so as to provide the trustee and his counsel at least some opportunity to explore with potential purchasers and others the possibility of a fair, equitable and feasible plan of reorganization for the company. (A 91)

* * *

The question—the primary question before the Court is whether the press customers who are here assembled and particularly those press customers whose presses are expected to be delivered before September 8th are prepared to come forward in the manner indicated in the order to show cause.

* * *

I would urge each of the gentlemen to keep in mind that unless all of the press customers, particularly the press customers whose presses are scheduled for delivery before September 8th are prepared to take a statesmen like position in this matter, the interest of none of them will be served. (A 92)

Judge Ryan, in his introductory remarks put the problem in sharp perspective as follows:

Now, the only way that we can get the money is to go to the people whom I feel will receive the greatest benefit, the greatest immediate benefit for the continuation of the plant's operations and that is the press purchasers, the people who have contracts for presses, many of whom have paid substantial amounts

on account of the contracts and who need their presses.
(A 93-94)

It quickly became clear that unless a particular press customer was willing to accede to the Trustee's proposal, it would not, despite its contracts with the debtor therefor, have its press completed or delivered by the Trustee. Thus, as Judge Ryan pointedly advised those present:

Now that in a nutshell is the story; either you want these machines or you don't want them.

If you want the machines we have to have the money to complete them; we have to have the money to keep the plant going.

I have this else to say to you:

I do not intend if it is in any way possible that I can avoid it to adjudicate this company or to dismiss this petition so it might be adjudicated a bankrupt in some other proceeding.

If it is adjudicated a bankrupt I don't know where you would be with your machines or where the receiver would get and where he would get the money to complete the jobs and keep the place operating.
(A 98)

Furthermore, Judge Ryan declared:

If your clients don't want these machines don't take them, don't make the [additional] payment. It is as simple as that. (A 100)

And, again:

* * * we will complete those who have consented to this agreement. Those who do not we will take no action on it and nothing will be done to complete your machines. (A 106) * * *

If your client can't consent at this time he will not be included in this order and no work will be done and no delivery would be made to your client. (A 107)

While many press customers were willing to prepay the balances due under the original contracts, there was an expressed reluctance to pay the additional premium. Thus, one of the attorneys representing various customers suggested that the additional premium be treated as a loan to the Trustee in return for Trustee's certificates (A 99). In rejecting such suggestion, Judge Ryan stated:

That was discussed and it cannot be received under that condition;

No. 1, I want to point something out to you, that your creditors or your clients would have a claim against the estate as a general creditor for any additional amount they paid for the machines over and above the contract price. (A 99-100)

Judge Ryan later clarified such remark by stating that:

No, I said that even though you had made this payment of an extra 10 per cent, that would not be considered a waiver on the part of any purchaser of this right to claim this additional 10 per cent payment as an item of damage in the performance of the contract and file a claim in the event as he so selects [sic] as a general creditor for that amount. (A 111-12)

When the Trustee's attorney attempted to suggest that upon receipt of the presses by the customers, there would be "no trustee obligation of any sort"** (A 113), Judge

* This assertion of the Trustee's attorney was relied upon by Judge Ryan in his opinion below as evidencing a supposed awareness on Claimant's part that by entering into an agreement with

(footnote continued on following page)

Ryan interjected:

Except that they would have a right to file and claim as a general creditor for alleged breach of contract. (A 113)

Judge Ryan later added:

All I can tell you is this, if there is a reorganization here and you come in as a general creditor you might get some refund if you file a claim for damages for failure to complete the contract. (A 114)

Thus, the choice facing the press customers was clear: either (1) prepay the future balance due upon the original contract price, pay an additional premium over and above the contract price and hope to recover part of that additional premium by filing a proof of claim in the proceedings, or (2) fail to obtain the ordered press and be relegated to a claim to recover the moneys already paid on account, together with damages for breach of contract.

On July 22, 1971 an order was entered granting the Trustee's application. The order authorized the Trustee to direct the debtor to "devote its principal efforts to the manufacture and delivery" of the presses ordered by some 9 customers listed in the order (whose presses were scheduled for delivery by September 8, 1969) upon payment by those customers of the balances due under their original contracts with the debtor and to deliver the presses upon payment of an additional amount equal to 10% of the original contract price. The July 22, 1969 order also pro-

(footnote continued from preceding page)

the Trustee to pay a premium in order to obtain delivery, Claimant was electing to forego any claim for damages arising out of the debtor's failure to deliver the press at the original contract price. See A 157. As the above-quoted colloquy immediately subsequent to the Trustee's attorney's assertion indicates, such reliance was totally unjustified in that Judge Ryan himself made it clear that Claimant would nonetheless have the right to file a claim as a general creditor. See also pp. 11-13, 26-30 *infra*.

vided that the Trustee negotiate with the customers of the debtor whose presses were scheduled for delivery after September 8, 1969 "to determine the amount of prepayment and additional sum to be paid to the Trustee by each such press customer" (A 27-31).

Immediately prior to the signing of the July 22, 1969 order, there was an adjourned hearing on the Trustee's motion. During the adjourned hearing it was made clear by the Court that those press customers who agreed to pay the additional premium over and above the original contract price would not thereby waive any claim against the debtor for damages for breach of contract for failure to deliver the machine at the original contract price. Thus Judge Ryan stated on the record:

But even if you turn back that certificate, they would still have a claim, whether or not it would be sustained or not, as an administration claim, *they would still have a general claim, whether or not it would be sustained or not, a general claim as to additional amounts to be paid to get the machine over and above the contract price.* That is my understanding of the law. (A 122) (Emphasis supplied.)

When the attorney for certain of the customers suggested that the express reservation of the rights of the press customers to claim the additional amounts as damages be included in the July 22, 1969 order so that there could be no conceivable question of waiver of those rights, Judge Ryan replied that while he did not see any objection to having such a provision in the order, "it might complicate things" and that "this order primarily is designed not to govern that but to cover completion and to cover the issuance of the trustee's certificate" (A 123). Thus, the following colloquy took place:

The Court: Proof of claim of what?

Mr. Gould: On the additional amount.

The Court: You have that right. You want it in. If you want it in here I will put it in. But you have a right to file a claim for alleged brief [sic] of contract as a general creditor. (A 123)

Judge Ryan expressly declared that there would be no waiver, in the following colloquy which was applicable to all press customers who chose to pay the additional premium:

The Court: * * * I say that as a matter of law if you don't waive your right, you have it and I have been careful not to have you waive your right.

Mr. Gould: It is understood we are not waiving any rights.

The Court: I said that 50 times. I say it again.

Mr. Gould: We have it on the record. It is clear.

The Court: It is on the record as far as I remember for our last three meetings.

Mr. Gould: Fine. In those circumstances McClatchy will go along. * * * (A 124-25)

Indeed, in the Stipulation of Historical Facts agreed upon by the attorneys for all parties, the following undisputed facts appear:

At the July 22, 1969 hearing, the Court stated, in remarks applicable to all press customers represented thereat, including Press, that those customers who paid the additional premium would have the right to file a proof of claim for damages against the Debtor for failure to deliver their presses at the original contract price, and would not waive such right by agreeing to pay such premium. The Court also stated that it would not be necessary to expressly provide for such non-waiver in the July 22, 1969 Order. (A 149)

It was against the background of the foregoing assurances by the District Court that any claim for damages

would not be waived, that the consent of the press customers to the July 22, 1969 order was obtained and that Claimant, along with many other press customers whose presses were scheduled to be delivered after September 8, 1969, commenced negotiations with the Trustee with respect to the prepayment and additional premium sought by the Trustee. Claimant had already paid to the debtor an aggregate of \$596,041.20 prior to the commencement of the reorganization proceedings (A 146-47).* Claimant was also faced with the fact that unless it agreed to pay the additional premium, it would not get delivery of the press it had ordered from Hoe, nor could it obtain a press with the same features from any other manufacturer (A 146). Moreover, even had Claimant been able at that time to order a substitute custom made press of the same size and type from a different manufacturer, it would not have been able to obtain delivery until approximately one year from the date the contract for any such press was signed (A 146).

An agreement as to the prepayment and additional premium was thereafter reached between Claimant and the Trustee, which agreement was approved in consent order No. 29, dated and filed on November 3, 1969 (A 32-34). The November 3, 1969 order was but one of 15 similar orders entered into with other press customers of the debtor whose presses were scheduled for completion after September 8, 1969.** Each of these orders, as well

* This figure included \$5,716.40, not included in the contract price, for certain equipment to be used with the press which was to be manufactured by General Electric Company (A 147).

** The other orders were as follows:

<i>Order #</i>	<i>Customer</i>	<i>Date</i>
22	Dayton Newspapers, Inc.	October 10, 1969
26	Advance Publications Inc.	October 29, 1969
27	American Can Company	October 30, 1969
30	Chronicle Newspapers, Inc.	November 14, 1969

(footnote continued on following page)

as the order dated July 22, 1969 with respect to the 9 pre-September 8 delivery customers named therein, contained language similar to that found in the November 3, 1969 order with respect to Claimant to the effect that the Trustee was "authorized to direct the Debtor to devote its principal efforts to the manufacture and delivery of the press" ordered by the particular customer upon the payment to the Trustee of specified amounts, including the premium.

Pursuant to the agreement between Claimant and the Trustee, Claimant prepaid \$423,493 to the Trustee (A 151). \$177,028 of that sum represented the premium paid by Claimant to the Trustee over and above the original contract price (A 151).

The schedule for delivery adopted by the Trustee did not involve any priority from the delivery date originally contracted for, or any priority to Claimant over other customers whose presses the Trustee had elected to complete. This is made clear from Judge Ryan's remarks at the July 17, 1969 hearing wherein he declared:

* * * we will allow no abnormal variation which would permit anyone to receive favorable treatment above the schedule of deliveries which management had set before. (A 121)

Delivery of Claimant's press commenced on November 26, 1969 and was substantially completed by January 15,

(footnote continued from preceding page)

35	W. H. Hutchinson & Son, Inc.	December 3, 1969
38	Western Metal Decorating Co.	December 17, 1969
39	Phoenix Closures, Inc.	December 17, 1969
41	O Estado de Sao Paulo	January 5, 1970
44	Continental Can Co., Inc.	January 14, 1970
48	Gulf Printing Co. & Ruralist Press	January 9, 1970
55	Crown Cork & Seal Co., Inc.	March 18, 1970
56	American Can Company	October 30, 1969
63	Plainfield Courier News Co.	April 27, 1970
67	S.A. Jornal do Brasil	June 2, 1970

1970 (A 151). On January 7, 1970, Claimant filed a proof of claim for the \$177,028—the exact amount of the additional sum it paid over the original contract price, which claim was the subject of the Trustee's objection and is the subject of this appeal (A 151).

Summary of Argument

It will be demonstrated below that the failure and refusal of the debtor and its Trustee to deliver the press ordered by Claimant unless Claimant paid a premium over and above the original contract price was a breach of contract entitling Claimant to damages and giving rise to a claim which Claimant was entitled to assert in the debtor's reorganization proceedings. It will further be shown that Claimant's agreement to pay a premium to the debtor's Trustee did not amount to a novation or substituted contract which destroyed Claimant's right to damages for breach of the original contract and that Claimant did not thereby elect to forego its right to file a proof of claim to recover such damages. In addition, whether or not the agreement whereby Claimant was required to pay a premium to the Trustee in order to have its press completed and delivered could be construed as a novation or substituted contract, such agreement to pay a premium was the result of economic duress and Claimant is entitled to recover the premium. Finally, it will be shown that the premium paid by Claimant over and above the original contract price constituted an actual and necessary expense of preserving the estate of the debtor subsequent to the filing of the reorganization petition and was thereby recoverable by Claimant as a priority administration claim.

ARGUMENT**POINT I**

The failure and refusal of the debtor and its Trustee to deliver the press ordered by Claimant at the original contract price was a breach of contract entitling Claimant to damages.

It is hornbook law that an unjustified failure to perform all or any part of what is promised in a contract is a breach, for which the aggrieved party is entitled to be compensated in damages. Simpson, *Contracts* § 141 p. 501 (1954); *Restatement, Contracts* § 314. See, e.g., *Cameron-Hawn Realty Co. v. City of Albany*, 207 N.Y. 377, 381-82 (1913).* The law is also clear that a repudiation of a contract communicated from one party to the other, prior to the time for actual performance is a breach which creates an immediate right of action. New York Uniform Commercial Code § 2-610 and Official Comments 2 and 4 thereto. Section 2-610 is consistent with the New York cases recognizing the doctrine of anticipatory repudiation. See, e.g., *Wester v. Casein Co.*, 206 N.Y. 506, 513-14 (1912); *Nichols v. Scranton Steel Co.*, 137 N.Y. 471, 485-86 (1893). See also 4 Corbin, *Contracts* § 959 (1951 ed.); *Restatement, Contracts* § 318. The refusal of one party to perform or to continue to perform a contract unless there is a change in a material term is such a breach. New York Uniform Commercial Code § 2-610, Official Comment

* Since the parties to the original contract failed to provide that the law of any particular jurisdiction should govern their rights under the contract, New York law applies, as the transaction in issue bears "an appropriate relation" to New York. New York Uniform Commercial Code § 1-105. The debtor is a New York corporation whose plant and corporate offices were located in New York. The contract was accepted by the debtor in New York. Finally, since delivery under the contract was to be made f.o.b. debtor's plants, title was to pass to Claimant in New York. See New York Uniform Commercial Code §§ 2-319, 2-401.

2; *Restatement (Second) Contracts* § 274, Comment d (Tent. Draft No. 9, 1974). See, e.g., *United States Navigation Co. v. Black Diamond Lines, Inc.*, 124 F.2d 508 (2d Cir. 1942), cert. denied, 315 U.S. 816 (1942); *Lace Selling Co. v. Shapiro*, 249 N.Y. 68, 72 (1928); *Schmidt v. C.P. Builders, Inc.*, 36 A.D.2d 731, 320 N.Y.S.2d 460, 461 (2d Dep't 1971); *Allen v. Hurum*, 220 App. Div. 273, 221 N.Y. Supp. 171, 173 (1st Dep't 1927); *Zelazny v. Pilgrim Funding Corp.*, 41 Misc. 2d 176, 244 N.Y.S.2d 810, 817 (Nassau Co. Dist. Ct. 1963). The refusal to perform unless the other party pays an additional amount above the purchase price has expressly been held to be actionable. See, e.g., *Schmidt v. C.P. Builders, Inc.*, *supra*; *Sherry v. Federal Terra Cotta Co.*, 172 App. Div. 57, 158 N.Y. Supp. 241, 244 (1st Dep't 1916).

As set forth above, at the outset of the reorganization proceedings, the Trustee and the District Court expressly advised the press customers of the debtor, including Claimant, that the Trustee would refuse to manufacture and deliver the presses which the debtor had contracted to manufacture and deliver, unless there was a prepayment of the balance due under the original contract and an additional premium paid over the original price. See pp. 6-9, *supra*. See also A 98, 100, 106-07, 124, 133-34. Under the authorities cited above, such refusal by the Trustee amounted to a breach of the debtor's contract with Claimant. Claimant was thereby entitled to assert such breach in a proof of claim. See Bankruptcy Act § 63a(9). By reason of such breach, Claimant was damaged in the amount of \$177,028, the difference between the original contract price and the price which Claimant was finally required to pay to obtain the press which it had ordered. See New York Uniform Commercial Code § 2-712.*

* It is not disputed that if Claimant's claim were to be allowed, \$177,028 would be the amount allowed. Indeed, as set forth above, the District Court expressly recognized that such sum would be the correct measure of damages. See pp. 9, 11, *supra*.

Furthermore, Section 202 of the Bankruptcy Act, applicable to Chapter X proceedings, provides in relevant part that:

In case an executory contract shall be rejected pursuant to * * * the permission of the court given in a proceeding under this chapter * * * any person injured by such rejection shall, for the purposes of this chapter * * * be deemed a creditor.

If, as appears to be the case, the original contract between the debtor and Claimant was an "executory contract" within the meaning of Sections 202 and 116(1) of the Bankruptcy Act, in that further performance was required by both parties to the contract,* it is clear that there was a rejection of that contract by the Trustee, which rejection was approved by the Court under Section 116(1) of the Bankruptcy Act. Such rejection and approval thereof was the result of the following actions, among others:

- (a) the Trustee's application which resulted in the order of July 22, 1969 (see pp. 6-7, *supra*);
- (b) the position taken by the Trustee at the hearings upon that application indicating that those customers who did not agree to pay the requested premium above the original price would not get delivery of their presses (see p. 7, *supra*; A 92);
- (c) the choice presented to the press customers at such hearings through such statements by the District Court as "If your clients don't want these machines don't take them, don't make the [additional] payment" (see p. 8, *supra*; A 98, 100) and "we are not going to complete these deliveries unless they voluntarily consent to this" (A 124, see also A 106-07, 133-34);

* See, e.g., 6 Collier, *Bankruptcy*, §§ 2.11, 3.23 (14th ed. 1972).

- (d) the District Court's statements that the press customers who agreed to pay premiums over the original contract prices would have the right to file proofs of claim for the difference as damages for breach of contract (see pp. 9-12, *supra*; A 113, 114, 122, 123, 149); and
- (e) the July 22, 1969 order authorizing delivery of the presses conditioned upon payment of the premiums above the original contract prices (see pp. 10-11, *supra*; A 27-31).

Such rejection of the original agreement constituted a breach of contract, which Claimant was entitled to assert. See Bankruptcy Act § 63c. See also, *In re United Cigar Stores Co.*, 89 F.2d 3 (2d Cir. 1937); *Workman v. Harrison*, 282 F.2d 693, 699 (10th Cir. 1960); 6 Collier, *Bankruptcy* ¶ 3.24[1] (14th ed. 1972). Claimant thereby became a creditor of the debtor entitled to file a proof of claim for the damages resulting to it by reason of such rejection. Bankruptcy Act § 202, quoted above. See also *In re Huyler's*, 107 F. Supp. 318, 323 (S.D.N.Y. 1952), *aff'd, sub nom. New York v. Feinberg*, 204 F.2d 502 (2d Cir. 1953).

In sum, as has been demonstrated above, whether or not the Trustee is deemed to have "rejected" the original contract, the Trustee's refusal to allow the debtor to perform Claimant's contract at the original contract price was a breach of contract, entitling Claimant to damages.

POINT II

Claimant's agreement to pay a premium to the Trustee to complete the contract did not amount to a novation or substituted contract which precluded Claimant from claiming damages for breach of the original contract and Claimant did not thereby elect to waive its right to assert such claim. The District Court erred in so holding.

In his objection to Claimant's claim, the only ground advanced by the Trustee was that there supposedly was a "novation of the original contract" which was "specifically agreed to by claimant" (A 60-61). This supposed novation, the Trustee contended, resulted from Claimant's agreement to "renegotiate its contract with the Debtor" and to pay a premium of \$177,028 over the original contract price in consideration for a supposed "priority" embodied in the November 3, 1969 order whereby the Trustee was authorized to devote its "principal efforts" to the manufacture and delivery of the equipment which had been ordered by Claimant from the debtor prior to the commencement of the reorganization proceeding (A 60). Although it did not explicitly so state, the District Court, in rejecting the Special Master's conclusions and recommendation that Claimant's claim be allowed in full, apparently agreed with the Trustee's position (A 156-58). As will be demonstrated below, the Trustee's contention is totally without legal or factual foundation.

A. There Was No "Novation" Or Substituted Contract.

Although improperly using the term "novation" as the basis of his objection,* the Trustee's contention is evidently

* The term "novation" is properly applicable only to the situation whereby a third party assumes the obligations of a party to a contract and thereby discharges the latter's obligations under that contract. See, e.g., 6 Corbin, *Contracts* § 1297 (1951 ed.).

that the agreement to pay a premium for completion amounts to a substitute contract which implicitly discharged the debtor's obligations under the original contract, including its obligation to pay damages for its failure and refusal to perform under the original contract at the original contract price. However, the law is clear that where there is a breach of contract, the mere fact that a party proceeds to perform under a new or altered contract does not, in the absence of an intention on his part to waive a right of action therefor, preclude him from recovering for the breach of the original contract. See *United States Navigation Co. v. Black Diamond Lines, Inc.*, 124 F.2d 508 (2d Cir. 1942), cert. denied, 315 U.S. 816 (1942); *McMasters v. State*, 108 N.Y. 542, 553 (1888); *McGowan & Connolly Co. v. Kenny-Moran Co.*, 207 App. Div. 617, 202 N.Y.Supp. 513 (1st Dep't 1924); *Arzani v. People*, 149 N.Y.S.2d 38 (Sup. Ct. Onondaga Co. 1956). Cf. *Schwartzreich v. Bauman-Basch, Inc.*, 231 N.Y. 196, 203 (1921); *Galway & Co. v. Prignano*, 134 N.Y.Supp. 571 (App. T. 1912). As set forth by the New York Court of Appeals in the *McMasters* case:

The contention that, where there is a breach of contract by one party and the other thereafter is permitted to perform the same in part, receiving the contract price for such part performance, the injured party thereby waives or releases his right to damages for the breach, has no foundation in reason or authority.

108 N.Y. at 553.

The burden of proving the termination of the original contract is upon the party asserting it. As set forth in *McGowan & Connolly Co. v. Kenny-Moran Co., supra*:

In the case at bar, the most that the plaintiff shows is that it relied on its right to breach the contract, and that it insisted that it would do so if it was not given the additional compensation. * * *

The burden was on the plaintiff to show that the existing contract was terminated and a new contract was made for the increased price; but this the plaintiff has failed to do. (Emphasis supplied.)

202 N.Y.Supp. at 513-14.

See also *Galway & Co. v. Prignano, supra*, at 572.

In the present situation, the facts are crystal clear that in agreeing with the Trustee to pay an additional amount in order to obtain delivery of the press which the debtor was already obligated to deliver at the original purchase price, Claimant did not waive its rights under the original contract with the debtor and specifically, did not waive its rights to seek damages by reason of the debtor's breach of contract in failing and refusing to deliver the press at the original contract price. The Trustee can point to no express agreement in the so-called "new" contract providing for such waiver. Nor, as the authorities cited above demonstrate, can such a waiver be implied from the mere fact that Claimant agreed to pay the additional price under the threat of non-delivery. Indeed, as set forth in the above statement of facts, far from being a waiver, it is undisputed that there was in fact an express reservation of rights on behalf of the press customers, which reservation was explicitly affirmed and reiterated on the record both by the press customers and the District Court. See pp. 11-13, *supra*. Thus, the record overwhelmingly supports the following crucial findings made by the Special Master in his Report:

The plain fact is that the trustee (quite possibly because he had no alternative course) entered into the arrangements which he did with this claimant and other claimants similarly situated without first having obtained from those claimants an express written waiver of their right to file claims. *The record makes it clear, on the contrary, that the trustee entered into the arrangements which he did with this claimant and others*

similarly situated with the full knowledge that this claimant did not regard the transaction as a novation or a substituted contract. (A 69). (Emphasis supplied.)

The present case involves a situation strikingly similar to the situation presented in *United States Navigation Co. v. Black Diamond Lines, Inc.*, 124 F.2d 508 (2d Cir. 1942), cert. denied, 315 U.S. 816 (1942). There, the original agreement was to charter vessels for a period which permitted two round trip voyages. Upon the shipowner's failure to permit the charterer to use the vessel unless it agreed in a new contract to limit the use of the vessel to only one round trip voyage, the charterer signed the new contract so providing, but stated that its signature was made under protest and expressly reserved its rights. By reason of the breach of the first agreement, the charterer was compelled to hire other vessels for the balance of the charter periods and subsequently brought an action against the owner for its damages. In reversing the District Court's dismissal of the complaint (libel in admiralty), this Court rejected the owner's contention that there was an implied agreement to rescind the original contract and substitute the new contract therefor, declaring:

* * * we think that the written charters did not wipe out or rescind the oral [original] agreements. They only embodied promises to carry them out to the extent of one voyage for which the appellee was already bound, instead of for two voyages and pro tanto were wholly consistent with the oral charters. In view of the appellant's notices of protest and reservation of rights which accompanied the signature of the written charters it seems unreasonable to say that the execution of the charters signified an abandonment of the option for two voyages granted by the oral agreements or effected more than an agreement to accept a charter for a single voyage and a promise to pay hire

pro tanto for what was the minimum requirement of the earlier agreement.

* * * For the foregoing reasons, it seems apparent that the signed charters were not substitutions for the oral agreements and were not intended as rescissions thereof, and that consideration therefor was lacking.*

124 F.2d at 510.

Similarly, in the present case, in view of the express reservation of rights on behalf of the press customers, which reservation was explicitly affirmed and repeated on the record both by the press customers and the District Court prior to any agreements to pay premiums for completion and delivery of the presses (see pp. 11-13, *supra*), it is readily apparent that such new agreements between the press customers and the Trustee "were not substitutions for the * * * [original] agreements and were not intended as rescissions thereto." Indeed, as the Special Master found:

it seems quite clear * * * that, contrary to the position of the trustee, the claimants did not agree to relinquish their right to file a claim against the debtor for breach of its original contract. (A 69)

The Trustee's contention in his objection to claim that by reason of the supposed "priority" in delivery of the

* This Court in the *United States Navigation Co.* case also held that the action to recover for breach of the original contract should stand and that the new agreement was a proper attempt to mitigate damages. 124 F.2d at 511. Similarly, in the present case, the new agreement between Claimant and the Trustee can properly be regarded as an attempt to mitigate damages, since otherwise Claimant would have had a much larger claim than the present one, including a claim for damages for non-delivery and for recovery of the approximately \$596,000 which Claimant had already paid prior to the filing of the reorganization petition. See New York Uniform Commercial Code § 2-711.

press to Claimant there was "consideration" for the agreement to pay the premium over the original contract price (A 60) is both irrelevant and without foundation. In the first place, whether or not there was consideration for the new agreement, or whether any consideration was necessary is irrelevant, since, as demonstrated above, the new agreement did not amount to a rescission of Claimant's rights under the original contract. See pp. 21-23, *supra*. See also *United States Navigation Co. v. Black Diamond Lines, Inc.*, *supra*, 124 F.2d at 511.

Moreover, the supposed "priority" in delivery was no priority at all. As set forth above, the provision in the order of November 3, 1969 authorizing the Trustee to direct the debtor to devote its "principal efforts" to the manufacture and delivery of Claimant's press was similar to approximately 14 other orders entered into with respect to other press customers at or near the same time as the entry of the order with respect to Claimant's press and was also similar to the order of July 22, 1969 dealing with 9 other press customers. See pp. 13-14, *supra*. The effect of the "principal efforts" language in the various orders was merely that the presses which had been contracted for would in fact be manufactured and delivered by the debtor, whereas otherwise the debtor would not do so. See, e.g., A 98, 100, 106-07, 124, 133-34. Furthermore, there was no acceleration in the delivery date for Claimant's press by reason of the agreement to prepay and pay a premium over the purchase price. As set forth above, the District Court explicitly stated that it would not permit any "favorable treatment above the schedule of deliveries which management had set before" (A 121). Moreover, Claimant's press was originally scheduled to be delivered commencing August 1, 1969 (A 47), whereas delivery actually took place between November 26, 1969 and January 15, 1970, long after the originally scheduled dates (A 151). Thus, the "priority" relied upon by the Trustee is non-existent.

B. Claimant Did Not Elect to Waive Its Right To Assert a Claim to Recover the Premium.

The basis of the decision of the District Court disallowing Claimant's claim was that by agreeing to pay the Trustee a premium over and above the original contract price in order to obtain completion and delivery of the press, Claimant thereby elected to waive its right to assert a claim to recover that premium. Thus, the District Court held as follows:

Claimant was faced with a business decision: (1) either to pay no more and to assert an unsecured claim for the money it had paid on account to the Debtor; or (2) to agree with the Trustee to pay immediately the balance of the purchase price plus an additional negotiated amount to enable the Trustee to complete the press. PRESS PUBLISHING chose the latter alternative. It cannot now have the benefit of its choice to acquire its press and, at the same time, assert a claim for the money it agreed to pay to enable the Trustee to manufacture it.* (A 157)

It is submitted that such holding is manifestly erroneous, both in its statement of the choices facing Claimant and its conclusion that Claimant's choice to have the press completed and delivered by the Trustee precluded the

* The premium paid by Claimant to the Trustee not only enabled the Trustee to complete the press ordered by Claimant, it also yielded a profit to the Trustee. As stated by the Trustee's attorney at a hearing held on September 8, 1969 in remarks applicable to those customers such as Claimant whose presses were originally scheduled to be delivered after that date:

I should point out to your Honor that what we are doing at this stage, now that we have had this somewhat of a turn-around period, has been to try, to the fullest extent that we can, to actually cost out what is required to complete the press and also complete the press at a fair and reasonable profit to the trustee in reorganization running this company (A 129). (Emphasis supplied.)

assertion of a claim to recover the premium insisted upon by the Trustee as a condition to completion and delivery. The District Court's holding is squarely contradictory to the repeated representations and assurances made by the District Court to Claimant and the other press customers in order to induce them into entering into agreements to make prepayments and to pay premiums to the Trustee, that such customers had the right to assert a claim to recover damages resulting from the breach of the original agreements and that such right would not be waived by entering into the agreements with the Trustee. See pp. 9-13, *supra*. Such holding also flies in the face of agreed upon facts to that effect contained in a Stipulation of Historical Facts submitted to the District Court at its own request (A 149).

Thus, choice "(1)" presented to Claimant was not merely to "pay no more and to assert an unsecured claim for the money it [Claimant] had paid on account to the Debtor"; rather, such choice also included the further right to claim damages by reason of non-delivery at the contract price. See New York Uniform Commercial Code § 2-711, *et seq.* Similarly, choice number "(2)" as presented by the District Court is also incomplete, as it omits to include therein the right to claim for damages for the premium. That such right exists and should properly have been included in choice "(2)", has been extensively demonstrated above. See pp. 9-13, 16-19, 20-25, *supra*. By omitting to include such right in choice "(2)", the District Court enabled itself to logically reach its conclusion that Claimant could not both obtain delivery by paying a premium and later seek to recover that premium by way of proof of claim. However, such premise and conclusion flies in the face of the assurances made by the District Court to the press customers that they could indeed both get delivery by agreeing to pay a premium to the Trustee *and* attempt to recover that premium by way of proof of claim. Thus, the

District Court's opinion totally disregards that Court's own statements such as the following:

The Court: All I can tell you is this, if there is a reorganization here and you come in as a general creditor you might get some refund if you file a claim for damages for failure to complete the contract. (A 114);

and:

The Court: No, I said that even though you had made this payment of an extra 10 per cent, that would not be considered a waiver on the part of any purchaser of this right to claim this additional 10 per cent payment as an item of damage in the performance of the contract and file a claim in the event as he so selects [sic] as a general creditor for that amount. (A 111-12)

See also, e.g., A 122, 123.

To support its conclusion that Claimant was aware that by agreeing to pay a premium for completion and delivery it would thereby forego any right to claim damages for breach of the original agreement, the District Court quoted from statements made by the Court and by the Trustee's attorney during the hearings leading to the July 22, 1969 order (A 157). In so doing, the District Court simply overlooked and omitted to quote its own statements made immediately subsequent to the quoted statements which lead to just the opposite conclusion, to wit, that the press customers were advised that indeed they had a right to claim damages for breach of the original agreement and that such right would not be waived if the press customers entered into the agreements sought by the Trustee. Thus, the District Court in its opinion (A 157) quoted the following statement made by it at the July 17, 1969 hearing:

"If delivery is made, you (the customer) would not get any refund whatsoever." (Transcript of 7/17/69, p. 152)

The District Court omitted, however, to quote its colloquy with an attorney for one of the press customers which immediately followed the quoted statement:

Mr. Holbin: If delivery is made did I understand the Court to say that it would treat the claims as a general unsecured claim?

The Court: No, I said that even though you had made this payment of an extra 10 per cent, that would not be considered a waiver on the part of any purchaser of his right to claim this additional 10 per cent payment as an item of damage in the performance of the contract and file a claim in the event as he so selects [sic] as a general creditor for that amount. (A 111-12)

The District Court also quoted (A 157) the following statement by the Trustee's counsel at that hearing:

" . . . where there are moneys paid to the trustee that those will be treated, I think as it was fairly stated, that those will be treated as administration expenses in the event that the customer did not receive his press as expected.

"However, upon receipt of the press there would be no administration claim, no trustee obligation of any sort." (Transcript 7/17/69, p. 154)

Here again, the District Court omitted to quote its own immediate retort to the Trustee's counsel's statement:

The Court: Except that they would have a right to file and claim as a general creditor for alleged breach of contract. (A 113)

Moreover, quite apart from the above instances of the District Court's reliance upon statements taken out of context, the District Court totally ignored in its opinion the many other statements—both before and after the state-

ments quoted by the District Court in its opinion—wherein the District Court indicated at the hearings that the press customers who agreed to pay premiums would have a right to assert claims to recover damages by reason of the breaches of the original agreements and that such right would not be waived by entering into agreements with the Trustee to pay premiums to obtain delivery. See e.g., A 99-100, 114, 122, 123. Indeed, the District Court ignored the following undisputed facts in this proceeding which are included in the Stipulation of Historical Facts agreed to by the attorneys for Claimant and the Trustee:

At the July 22, 1969 hearing, the Court stated, in remarks applicable to all press customers represented thereat, including Press, that those customers who paid the additional premium would have the right to file a proof of claim for damages against the Debtor for failure to deliver their presses at the original contract price, and would not waive such right by agreeing to pay such premium. The Court also stated that it would not be necessary to expressly provide for such non-waiver in the July 22, 1969 Order. (A 149)

At the very least then, it was improper and erroneous for the District Court to use the statements quoted in its opinion to support its holding that Claimant elected to forego its claim to damages arising out of the debtor's failure and refusal to make delivery at the original contract price.

In summary, the Trustee's objection based upon a supposed "novation" or substituted contract is totally without merit. To the extent that the District Court agreed with that position and concluded that by agreeing to pay a premium to obtain delivery Claimant had elected to forego its rights to seek damages for breach of the original contract, the District Court was in error. Claimant is fully entitled to assert its claim for damages resulting from the debtor's failure and refusal to deliver the press under the original contract at the original contract price.

POINT III

Claimant's agreement to pay a premium in order to obtain completion and delivery of its press was the result of economic duress and Claimant is therefore entitled to recover the premium.

In Point I of this brief, Claimant demonstrated that the failure of the debtor and its Trustee to deliver the press ordered by Claimant unless Claimant paid a premium over and above the original contract price was a breach of contract giving rise to a claim for damages which Claimant was entitled to assert in the debtor's reorganization proceedings. In Point II herein, it was shown that Claimant's agreement to pay a premium did not amount to a novation or substituted contract which discharged Claimant's right to damages and that Claimant did not thereby elect to forego its right to claim such damages in this proceeding.

Quite apart from Abarta's right to damages for breach of the original contract, another basis exists whereby Claimant's claim for \$177,028 should be allowed. Thus, whether or not Claimant's agreement with the Trustee to pay a premium over the original contract price is construed as a substituted contract, the circumstances surrounding the agreement to pay a premium establish that such agreement was the result of economic duress imposed upon Claimant. Under applicable law, Claimant was thereby entitled to recover the premium paid to the Trustee.

In the leading case of *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 130 (1971), the New York Court of Appeals held that "[a] contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will." In *Austin*, a contractor of electronic equipment was held entitled to

recover from its subcontractor the amounts in excess of the original contract price which the contractor had been forced to pay the subcontractor in order to obtain certain necessary parts which were not readily obtainable elsewhere so as to avoid cancellation of the contractor's valuable government contracts and the payment of substantial liquidated damages thereunder. The existence of economic duress is established, the Court of Appeals held, when the following three-part test has been satisfied:

1. That one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand;
2. The threatened party could not obtain the goods from another source of supply; and
3. The ordinary remedy of an action for breach of contract would not be adequate.

29 N.Y.2d at 130-31.

As will be shown below, the undisputed record facts in this proceeding establish the existence of each of the factors necessary to establish that Claimant has been the victim of economic duress.

**A. The Trustee Threatened to Breach the
Original Contract by Refusing to Com-
plete and Deliver the Press Unless
Claimant Agreed to Pay a Premium.**

As has been demonstrated in the Statement of Facts herein (pp. 6-7, *supra*), at the outset of the reorganization proceedings, the press customers such as Claimant were ordered to show cause why the debtor should not devote its "principal efforts" to the manufacture and delivery of the presses of those customers who agreed to prepay the balances due under their contracts with the debtor and, in addition, agreed to pay premiums over the contract prices. At the July 17 and July 22, 1969 hearings upon the order

to show cause, the press customers represented thereat, including Claimant, were advised by the Trustee's attorneys and the District Court that unless sufficient press customers agreed to prepay the remaining balances on their contracts and pay the additional premiums requested by the Trustee, it was unlikely that Hoe could continue operations. Moreover, these press customers were also advised that it was unlikely that those press customers who did not agree to prepay the remaining balances on their contracts and pay the additional premium requested by the Trustee would get delivery of their presses (A 148). The District Court succinctly set forth the choice facing Claimant and the other press customers when it declared:

If your clients don't want these machines don't take them, don't make the [additional] payment. It is as simple as that. (A 100)

And:

* * * we will complete those who have consented to this agreement. Those who do not we will take no action on it and nothing will be done to complete your machines. (A 106)

In the following colloquy between the District Court and an attorney for one of the press customers at a hearing held on October 8, 1969, the District Court made the point in no uncertain terms:

You want something performed. Part of the work is done. You want it completed. For example, there are persons who call themselves painters, persons who call themselves decorators. You employ them and the painter or the decorator paints one side of your room and then comes to you and says, "The union wages went up. I got to get \$30 more for decorating this room and putting this finish on. Otherwise, I am going to walk out." You are going to give him that \$30 and get that work finished.

Mr. Shelton: Either that or do the work myself.

The Court: You know what a smear job you would get if you painted it yourself. You have got to have the proper psychological approach to this. You got to have money in your hands and you got to be willing to pay it. Otherwise, you can't get your machines.

* * *

The Court: What I am saying to you is for the benefit of the others, too. (A 133-34)

Thus, there was more than a threat not to make delivery unless a premium was paid—there was an outright refusal.

It is readily apparent therefore that the Trustee, with the approval of the District Court, threatened to breach the contract with Claimant unless Claimant prepaid the balance of the original contract price and paid an additional \$177,028 premium to secure the performance originally agreed upon. Thus, the first element of duress under *Austin Instrument, Inc. v. Loral Corp., supra*, is clearly satisfied.

**B. Claimant Could Not Obtain a Similar Press
From Another Source of Supply.**

The record establishes that the press ordered by Claimant from Hoe, like all of the presses manufactured by Hoe, was custom made for Claimant's needs and specifications (A 146). The average delivery time for a press of the size and type ordered by Claimant was approximately one year from the date the contract for any such press was signed (A 146). The press ordered by Claimant and eventually manufactured by Hoe contained features that were different from presses made by other press manufacturers and Claimant would not have been able to obtain a press with the same features from any such other manufacturer (A 146).

The undisputed facts thus clearly show that Claimant could not obtain a similar press from another source of

supply and was therefore under compulsion to pay the Trustee the premium demanded or receive no press at all. The second element of economic duress under *Austin Instrument, Inc. v. Local Corp., supra*, is thus satisfied.

C. The Ordinary Remedy of an Action for Breach of Contract Would Not Be Adequate.

The undisputed facts show that Claimant, the publisher of a daily and Sunday newspaper, had paid to the debtor prior to the reorganization proceedings \$596,041.20 out of a total original contract price of \$836,679 (A 145, 147). As shown above, the debtor was the only manufacturer capable of producing the press needed by Claimant and even if another manufacturer could do the job it would entail another year's wait from the date of any new contract (A 146). Thus, Claimant was faced on the one hand with the choice of accepting the Trustee's proposal by pre-paying the future balance due upon the contract price, paying an additional premium over and above the contract price and hoping to recover that premium by way of proof of claim, or, on the other hand, being unable to obtain the ordered press—the life blood of its existence—and being relegated to filing a claim for breach of contract for non-delivery and return of the moneys already paid.* Indeed, as the District Court remarked:

At the date of the reorganization petition, Claimant faced the loss of more than a half million dollars previously paid for a press that the Debtor could not deliver; *more important to PRESS PUBLISHING, it faced non-delivery of its much needed equipment*, which it could not receive if the Trustee had no funds to complete the manufacture. (Emphasis supplied.)

* Since the money already paid was not segregated by the debtor or held as a "trust fund" it was highly unlikely that Claimant could reclaim such money. Thus, Claimant would not have had anything more than a general claim with respect thereto.

Under such circumstances, it is clear that Claimant's normal legal remedy of refusing to pay the increased price and then suing for damages for Hoe's breach of contract (or filing a proof of claim therefor) would have been inadequate. Claimant could not turn anywhere for substitute performance. In other words, to paraphrase the New York Court of Appeals, "Claimant actually had no choice, when the prices were raised by the debtor, except to take the [press] at the 'coerced' prices and then sue to get the excess back." *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124 at 133 (1971). Thus, Claimant has firmly established the requisite third element of economic duress—the ordinary remedy of an action for breach of contract would not be adequate.

By reason of the fact that Claimant's agreement to pay a premium over and above the original contract price in order to obtain delivery of its press was the result of economic duress, Claimant was entitled to recover the premium. Thus, regardless of whether or not such agreement is regarded as a substitute for the original contract, Claimant's claim in the amount of the premium must be allowed.

POINT IV

Claimant's claim should properly have been allowed as an administration claim.

Claimant's proof of claim set forth, in the alternative, that it is an administration claim by reason of the fact that the payment by Claimant of a premium over and above the original contract price constituted an actual and necessary expense of preserving the estate of the debtor subsequent to the filing of the petition herein (A 41).

Section 216(3) of the Bankruptcy Act requires that a plan or reorganization "shall provide for the payment of all

costs and expenses of administration * * *." It is uniformly held that the cost of preserving the estate of the debtor or bankrupt is properly considered to be a cost and expense of administration. See, e.g., *Matter of Pressed Steel Car Co.*, 100 F.2d 147, 152 (3d Cir. 1938), cert. denied, 306 U.S. 648 (1939); *Crook v. Zorn*, 100 F.2d 792 (5th Cir.), cert. denied, 307 U.S. 630 (1939); 6A Collier, *Bankruptcy* ¶ 10.06 (14th ed. 1972); 3A Collier, *Bankruptcy* ¶ 62.14 (14th ed. 1972).

The record establishes beyond peradventure of doubt that the premium paid by Claimant was regarded by the Court and the Trustee as necessary to preserve the estate of the debtor. As set forth above, during the initial stages of the proceedings the debtor was confronted with a cash crisis and a dire need for several million dollars to enable it to continue in operation (A 23, 147). This money was raised in large part by having the press customers, such as Claimant, prepay the balances owing under their contracts with the debtor and pay a premium over and above the original contract price. See, e.g., A 93, 98, 141. It cannot seriously be disputed that without the prepayments made and premiums paid by the press customers such as Claimant the debtor could not have survived. As set forth in a memorandum (p. 5) dated January 6, 1970, submitted by the Trustee in support of his application to sell the assets of the debtor's press division:

During the past six months the reduction in expenditures and the cash generated from the renegotiation of existing press orders have permitted Hoe's press division to continue to operate as a going concern.

Thus, notwithstanding the assertions of the Trustee's counsel that there would be no administration claim (see A 113) and the uncertainty expressed by the District Court at the July 22, 1969 hearings (see A 122), it was recognized

that the funds, including the premiums, provided by Claimant, and other press customers similarly situated, were an indispensable factor in keeping the debtor alive and in enabling the reorganization proceedings to go forward.

Moreover, as shown in Point III herein, the premium paid during the reorganization proceeding was paid as the result of economic duress and thus is recoverable by Claimant in full as an administration expense.

Since the moneys paid by Claimant over and above the original purchase price were necessary to preserve the estate of the debtor and were paid as the result of economic duress, such amounts must properly be treated as administration expenses and Claimant's claim allowed as an administration claim.

Summary

It would be the height of inequity to allow the press customers to be induced into keeping the debtor alive by making prepayments and paying premiums above the original contract prices and then by disallowing their claims, to defeat the press customers' efforts to make themselves at least partially whole.

As shown, the failure and refusal of the debtor and its trustee to deliver Claimant's press at the original contract price was a breach of contract giving rise to a claim for damages provable in these reorganization proceedings. Claimant's agreement to pay a premium in order to obtain delivery did not amount to a novation or substituted contract which destroyed Claimant's right to damages for breach of the original contract and Claimant did not thereby waive its right to claim such damages in these proceedings. In so holding, the District Court erred. The agreement to pay a premium was in any event the result of economic duress and the premium is thereby recoverable by Claimant. Since the premium paid by

Claimant helped to preserve the estate of the debtor and prevent a bankruptcy adjudication, the premium was recoverable by Claimant as a priority administration claim.

Conclusion

The order of the District Court disallowing and expunging Claimant's claim should be reversed and the claim should be allowed in full as an administration claim or, alternatively, as a general creditor's claim.

Respectfully submitted,

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(56279)

Due and timely service of two copies
of the within plaint is hereby
admitted this 27th day of June 1977

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Attorneys for Appellants

DEPARTMENT 2 copies.

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